No. 78-490

# In the Supreme Court of the United States

OCTOBER TERM, 1978

HOUSTON DISTRIBUTION SERVICES, INC. AND SOUTHWEST WAREHOUSE SERVICES, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. A-48 to A-62) is reported at 573 F. 2d 260. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-47) are reported at 227 NLRB 960.

### JURISDICTION

The judgment of the court of appeals was entered on June 26, 1978 (Pet. App. A-63 to A-64). The petition for a writ of certiorari was filed on September 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioners violated Section 8(a)(3) and (1) of

the National Labor Relations Act by refusing to hire three applicants for employment and by discharging four employees in order to avoid bargaining with the union.

2. Whether, in the circumstances of this case, the Board properly amended the complaint to include the parent corporation of the wholly-owned subsidiary named in the unfair labor practice charge.

3. Whether the court of appeals properly found that no prejudice resulted from the Administrative Law Judge's refusal to admit certain evidence.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-4.

## STATEMENT

1. In December, 1974, the Company,[1] which provides public warehouse services, purchased the assets of Shippers Transportation Services ("Shippers"), including a long term lease on the Spikewood warehouse. Shippers' warehouse employees were represented under a collective bargaining agreement by Teamsters Freight, Tank Line and Automobile Industry Employees Local Union No. 988 ("the Union"). (Pet. App. A-22 to A-23.)

The Company began operating the Spikewood warehouse on February 1, 1975.[2] The existing workforce

[1]The Board found that petitioner Houston Distribution Services, Inc. (HDS) and its wholly-owned subsidiary, petitioner Southwest Warehouse Services, Inc. (Southwest), are single-employer within the meaning of the Act (Pet. App. A-3). Petitioners do not contest that finding here. Unless otherwise noted, petitioners are individually & jointly referred to herein as "the Company."

[2]After assuming control of the Spikewood facility, the Company continued to honor Shippers' obligations to customers. The major customers and principal products stored continued as before and only



at the warehouse was required to file application forms by February 3 for consideration for employment with the Company (Pet. App. A-8).

The Union's business agent visited Spikewood on February 3. He asked Company Vice-President Daniel Barrett if he knew that the Union represented the warehouse employees and that there was an existing contract. Barrett replied that he had no connection with the Union and that, as far as he was concerned, the Union was out. (Pet. App. A-9; Tr. 26-28, 45-46.)

Seventeen Shippers employees applied for jobs. Nine were hired, and eight were refused employment, including Eugene Plater, Emmet Lewis, and Phillip Ware. (Pet. App. A-10 to A-15; Tr. 84-86, 554-555, 604.) During the first week of February, Barrett hired six employees, who responded to a Company newspaper ad, including four college students with no experience in warehousing (Pet. App. A-8 to A-9, A-20 n.12; Tr. 72, 135, 604). Two additional employees were on the Company payroll when Spikewood was acquired and Barrett hired Company President Gary Stillwell's son as a regular part-time employee (Pet. App. A-9; Tr. 398-399, 555, 604, 614-615). Thus, the workforce at the end of the first week of February numbered eighteen employees.

On February 13, Barrett rejected the Union's request for contract discussions, stating that less than a majority of the Spikewood workforce were formerly employed by Shippers, that the majority of the workforce had no known union affiliation, and that Southwest was not required to bargain with a labor organization which did not represent more than half of its employees (Pet. App. A-18 to A-19). But see note 3, *infra*.

minor changes were made in the warehouse facility and the method of operation. (Pet. App. A-22 to A-28; Tr. 69-70, 98, 122-128, 144-145, 182, 473-474.) "Tr." references are to the transcript of the unfair labor practice hearing.

On February 26 or 27, Barrett and another supervisor learned that the Union had scheduled a meeting for the first week of March and that Raymond Mills and Nathaniel Jones, two former Shippers employees who had been hired by the Company, planned to attend the meeting (Pet. App. A-29 to A-30; Tr. 107-108, 232-235, 344-346, 348). On Tuesday, March 4, in the middle of a pay period, the Company discharged Mills and Jones as well as Wilford Davis and Curtis Mack, former Shippers employees and members of the Union (Pet. App. A-28 to A-29, A-32 to A-33; Tr. 115, 235-236). In discharging Jones and Mills, Barrett said that he was terminating them because "they" were not satisfied with their working conditions (Pet. App. A-32; Tr. 235, 280).

2. The Board concluded that the Company refused to hire three Shippers' employees, Plater, Lewis, and Ware, "because of a predesign * * * to decline to hire [Shippers] employees beyond a number constituting a majority of the work force" and thereby "avoid bargaining with the Union" (Pet. App. A-19, A-21). In so holding, the Board rejected the Company's contention that the three were denied employment because they could not report to work immediately and because their applications were either incomplete, ambiguous concerning the job sought, or failed to show warehousing experience. The Administrative Law Judge, whose decision was adopted by the Board, pointed out that, although the Company contended that it sought to hire the most qualified employees, it did not check with former Shippers' officials, including those hired by the Company, as to the qualifications of individual Shippers' warehousemen who applied for work with the Company (Pet. App. A-17). And, although the Company contended that the three former Shippers employees' applications did not disclose their qualifications for the job, it hired, in their place, college students with no previous experience in warehouse work. Finally, all three applicants were available for work



no later than February 4 and other applicants were hired who were not available until that date (Pet. App. A-19 to A-12).

The Board further found that Davis, Mack, Mills, and Jones were terminated "as a further step in [the Company's] effort to thwart the threat of union organization of its warehouse facilities" (Pet. App. A-32), rather than because of poor work performance as the Company contended. The Law Judge pointed out that, although the four employees' alleged work deficiencies "were detected shortly after hire" (Pet. App. A-30), and there were no "specific work derelictions or acts of misconduct at a time proximate to their terminations" (Pet. App. A-29), the employees were discharged in the middle of a pay period and shortly after the Company found out about their continuing interest in union representation (Pet. App. A-32). The Law Judge also relied on Vice-President Barrett's allusion to Jones' and Mills' continuing interest in the Union as grounds for their discharge (Pet. App. A-32).

Accordingly, the Board concluded that the Company violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to hire Plater, Lewis and Ware, and by discharging Mills, Jones, Davis and Mack (Pet. App. A-33).

Additionally, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union (Pet. App. A-33). The Board found that the Company was a successor employer to Shippers, and that, at the inception of operations, a majority of its employees had been employees of Shippers who were represented by the Union.[3] (Pet. App. A-24 to A-28.)

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[3]At the end of the first week of Febuary there were 18 employees in the workforce: nine Shippers employees, 6 new employees hired as a result of newspaper advertising, 2 employees already on the Company

The Board ordered the Company, *inter alia*, to offer employment to Plater, Lewis, and Ware, to reinstate the four discriminatorily discharged employees, and to bargain with the Union (Pet. App. A-34 to A-35).[4]

3. The court of appeals upheld the Board's decision and enforced its order. The court found that substantial evidence supports the Board's finding that the Company was motivated by anti-union animus in refusing to hire the three applicants and in discharging the four union adherents (Pet. App. A-54 to A-56, A-57). The court noted that the fact that the Company "had good cause to fire the four workers * * * is not enough to vitiate the Board's finding unless the good reason was a motivating cause of the discharge" (Pet. App. A-57).

The court found no error in the amendment of the complaint to include Southwest. It noted that "the addition of the correct corporate entity is not so completely outside the original charge that the Board could be said to have initiated a proceeding on its own motion" and observed that working men filing an unfair labor practice charge "are not required to wander the maze of corporate structure" (Pet. App. A-53).

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payroll, and the son of the Company president. Since the nine Shippers employees did not constitute a majority of the 18 employees hired, the Company considered that it had no obligation to recognize the Union (Pet. App. A-18 to A-19). However, since Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from employee status any individual employed by "his parent or spouse," President Stillwell's son was not properly included in the unit. Therefore, there were only 17 rank-and-file employees, and the nine former Shippers employees constituted a majority. (Pet. App. A-23 to A-24.)

[4]At the Board hearing, petitioners moved to dismiss the complaint on the ground that the charge and complaint named only HDS and that the alleged unfair labor practices related solely to Southwest. The Judge denied the motion because HDS and Southwest constitute a single employer and amended the complaint *sua sponte* to include Southwest. (Pet. App. A-2 to A-5; Tr. 13-17, 497-500, 587-588.)



The court did find that the Law Judge committed error in refusing to accept the testimony of a white employee, Bret Griffin, concerning the job performance of black employees on the ground that the testimony of the former would be likely to be animated by racial prejudice. However, the court found that the Company was not prejudiced thereby "because of the cumulative nature of the proposed testimony" (Pet. App. A-59).

## ARGUMENT

1. Petitioners contend (Pet. 6-7) that the instant case presents a conflict with the First Circuit as to the standard to be applied in discriminatory discharge cases where there is evidence that an employer had both proper and improper motives for the discharge. However, the Board, upheld by the court of appeals, found that the Company discharged the four employees solely to deter the unionization of its warehouse facilities and then attempted to justify the discharges with pretextuous reasons "unworthy of belief" (Pet. App. A-31). Accordingly, this case presents no occasion to resolve any difference between the First and the Fifth Circuits as to the proper standard to apply in assessing the lawfulness of a discharge in mixed-motive cases.

Similarly, the Board, upheld by the court below, found that the sole reason for denying employment to the three applicants was to avoid bargaining with the Union. Thus, assuming *arguendo* petitioners are correct in contending (Pet. 8) that *Howard Johnson Co., Inc.* v. *Hotel Employees*, 417 U.S. 249 (1974), stands for the proposition that a refusal of a successor to hire a predecessor's employees is lawful unless solely motivated by anti-union considerations,[5] the Board found that to be the case here.

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[5]There is, however, no merit to that contention. As the court of appeals correctly noted the sentence from *Howard Johnson* quoted by petitioners (Pet. 8) was not "an attempt to formulate a test for

Thus, the question actually presented is whether the Board improperly rejected petitioners' assertion that the failure to hire the three applicants and the discharge of the four employees were motivated by legitimate economic considerations. Those are merely evidentiary matters that do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951).

2. Contrary to petitioners' contention (Pet. 9), the court of appeals did not uphold the Board's action in amending the complaint by invoking any broad principle that a parent company is always answerable for its subsidiary. Rather, the court merely upheld the Board's finding, which petitioners do not contest here, that HDS and Southwest were, in fact, a single employer for the purposes of the Act. Thus, the case raises no question concerning the propriety of administrative action based only on common ownership of corporate entities.

3. Petitioners' contention (Pet. 7-8) that the error of the Administrative Law Judge in refusing to admit the evidence of Bret Griffin (*supra*, page 7) required dismissal of the complaint raises only the issue whether the court of appeals abused its discretion in determining that the error was not prejudicial because the disallowed testimony was cumulative. See *National Labor Relations Board* v. *Safway Steel Scaffolds Co. of Georgia*, 383 F. 2d 273, 277 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968). That

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burden of proof in successorship cases (Pet. App. A-54)," but merely gave an example of conduct which would be unlawful. The court added (*ibid.*):

> Indeed, after citing with approval two cases, neither of which adopts a "sole motivation" test, Mr. Justice Marshall further states, "There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grisson employees because of their union membership, activity, or representation." [417 U.S. at 262 n.8.]



factual question is not appropriate for review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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